U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

DEC 07 2004

FILE: WAC 03 049 50313 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional documentation and contends that the director erred in evaluating the petitioner's evidence, which counsel asserts has established the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 14, 2001. The proffered wage as stated on the Form ETA 750 is $462 per week, which amounts to $24,024 per annum. The ETA 750B, signed by the beneficiary on March 12, 2001, does not indicate that she has worked for the petitioner.

On Part 5 of the petition, filed November 29, 2002, the petitioner states that it was established in 2002, has a gross annual income of $163,486, a net annual income of $108,992, and currently employs four workers.

With the petition, the petitioner submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. It reflects that the sole proprietor files his taxes as a single person and operated the petitioning business as a sole proprietorship during this year. The tax return shows that he reported $107,455 in individual adjusted gross income, including $21,754 in net business income. Two copies of Schedule C (Profit or Loss From Business) of this tax return indicate that the sole proprietor derived his total net business income from two restaurants. The petitioning restaurant reported gross income of $163,486, total expenses of $194,083 including wages of $27,983, and a net profit of $52,351. The sole proprietor's other business reported a net loss of $30,597.

The petitioner also submitted copies of the petitioner's articles of incorporation, state corporate registration statement, bylaws, and copies of the petitioner's state quarterly wage reports for the quarters ending June 30, 2001 through June 30, 2002. It is noted that an employee bearing the name of "Soo J. Kim" appears on all of these wage reports. It is unclear if this is the same individual as the alien beneficiary. In a cover letter submitted with the original documentation, counsel explains that the sole proprietor incorporated the petitioning business but offers the same terms and conditions of employment as those stated on the original offer of employment.

On April 28, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proposed wage offer. The director specifically requested that the petitioner provide copies of the Internal Revenue Service (IRS) tax return computer printouts from 2001 to the present. The director also requested the petitioner to provide copies of the petitioner's current valid business licenses.

In response, the petitioner submitted a copy of the sole proprietor's individual tax return for 2001, the corporate tax return filed for 2002, as well as IRS computer printouts of these respective filings. The petitioner also submitted a Los Angeles tax registration certificate issued April 20, 2002, in the name of the petitioner. The corporate tax return reflects that covers the period from February 7, 2002 to December 31, 2002. On this tax return, the petitioner declared $1,414 in net income. Schedule L of the tax return shows that the petitioner had $21,745 in current assets and reported no current liabilities, resulting in net current assets of $21,745. Besides net income, CIS will also review a corporate petitioner's net current assets as an alternative method of evaluating a petitioner's ability to pay the proffered wage. Net current assets represent the difference between the petitioner's current assets and current liabilities,[1] and are a measure of a petitioner's liquidity during a given period. A corporation's year-end current assets are shown on Schedule L, lines (1) through (6). Its year-end current liabilities are shown on lines (16) through (18). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 19, 2003, denied the petition.

On appeal, counsel resubmits copies of the petitioner's 2001 and 2002 tax returns, as well as the petitioner's 2002 L.A. tax registration certificate after it incorporated. Counsel also provides a copy of the sole proprietor's individual tax return for 2002. It shows that the sole proprietor declared $78,784 in adjusted gross income, including -$1,177 in net business income.

On appeal, counsel initially questions the director's figure related to net current assets. Although the director did not clarify how he calculated net current assets, as set forth above, it represents the difference between current assets and current liabilities, and does include inventory value as subsequently referenced by counsel. The petitioner's 2002 total assets of $45,865, as reflected on Schedule L, are not the figure that CIS considers in the determination of the ability to pay the proffered wage because the petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel also asserts that the director erred in denying the petition based on an incomplete consideration of the record including the combined wages of approximately $78,000 that the sole proprietor paid to the employees of both restaurants during 2001.

Counsel's contention is not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, as noted above, the wage reports show that the petitioner employed a person with a similar name as the alien's in 2001 and 2002. A social security number was listed on these wage reports, but none was provided for the alien on the visa preference petition. The director's decision stated that the petitioner did not currently employ the beneficiary. Other than mentioning a 1992 AAO case in which the actual payment of wages to an alien was determinative in overcoming the grounds for denial, no specific contradiction of the director's conclusion in this matter has been submitted on appeal. As no further evidence corroborates that the petitioner has employed the beneficiary, no consideration of such wages can be evaluated.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage, as argued by counsel, is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner was initially structured as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer, supra.*

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor filed as an individual and reported an adjusted gross income in 2001 of $107,455. Although the director failed to request a summary of the sole proprietor's household expenses during this period, it is recognized that the proffered wage represented only 22% of a single individual's income, who, unlike the *Ubeda* petitioner, did not declare any dependents. It would seem reasonable that the sole proprietor could live on the remaining income after paying the proffered salary of $24,024.

Counsel also asserts that in 2002, the petitioner's gross income for both restaurants reported on Schedule C totaled $120,069 and that the combined payment of wages of $20,740 should be considered in the review of the petitioner's ability to pay the proffered wage. It is noted that the petitioning business on the visa preference petition incorporated in 2002. As such, the individual assets and liabilities of the sole proprietor are not considered as part of the equation because a corporation is a separate and distinct legal entity from its owners or stockholders. In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. *See* 18 Am. Jur. 2d *Corporations* § 44 (1985); *See also, Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). As noted above, unless the petitioning restaurant has already employed the beneficiary, then monies expended as salaries and wages to other employees is not determinative of the ability to pay the proffered wage to a new worker. Further, consideration of gross income is not appropriate unless the expenses incurred in order to generate that income are also included in the calculation.

Counsel also cites *Elatos Restaurant Corp. v. Sava*, and *K.C.P. Food Co., Inc. v. Sava, supra,* in support of the petitioner's position that it has submitted sufficient evidence to carry its burden in establishing the petitioner's ability to pay the proffered wage. As the record currently stands, the AAO cannot agree. Neither the petitioner's declared net income, nor its net current assets were insufficient to meet the proffered wage of $24,024 in 2002. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In the context of the financial information contained in the record, counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the evidence establishes that the petitioner's length of operation and future prospects for success establishes its ability to pay the proffered wage. *Matter of Sonegawa* however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. The two years of tax returns submitted in this case do not establish a framework of profitable years similar to the scenario described in

Matter of Sonegawa, supra. Nor can the AAO conclude that the petitioner has demonstrated that the unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Based on a review of the evidence contained in the underlying record and the additional evidence and argument offered on appeal, the AAO concludes that the evidence is not sufficiently persuasive to demonstrate that the petitioner has had the continuing ability to pay the proffered wage as of the priority date of the petition.

Beyond the decision of the director, it is noted that the petitioner's 2002 corporate tax return lists the former sole proprietor as the only officer of the corporation, but names him as only a 50% shareholder. It is unclear who may own any other shares of the petitioning corporation. However, it is noted that if the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group,* the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired. As the appeal will be dismissed, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.